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No. 73-671

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In the Supreme Court of the United States

OCTOBER TERM, 1973

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and **LEE O. MAYER**, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and **MATERIAL SERVICE CORPORATION**, a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court's Memorandum and Order of June 9, 1972, setting aside the verdict and the judgment thereon is not reported but is set forth in Petitioner's Appendix at page 23a. The September 28, 1971, Findings of Fact and Conclusions of Law of the District Court granting

summary judgment on the issues of liability presented by the counterclaim are not reported but appear in Petitioners' Appendix at page 27a. The District Court's May 7, 1971, Memorandum Opinion ordering that Material Service Corporation be made a party defendant in the action and reinstating its counterclaim is not reported but appears in Petitioners' Appendix at page 33a. The Opinion of the Court of Appeals for the Seventh Circuit is not yet reported but appears in Petitioners' Appendix at page 1a. Mr. Justice Clark's dissenting opinion is found on page 16a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

For the reasons stated in our "Statement Of The Case", the question presented must be rephrased as follows:

Whether, in an action brought against a vendor pursuant to Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, the "in commerce" requirements of the Act are met where none of the sales by the defendant to plaintiff or by defendant to plaintiff's competitors are in interstate commerce and the plaintiff is not engaged in interstate commerce and is not a competitor of companies which are engaged in interstate commerce.

STATUTES INVOLVED

The statutes involved are Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), and Section 4 of the Clayton Act, 15 U.S.C. §15 which are set forth in the Petition at page 3.

STATEMENT OF THE CASE.

The Petitioners' description of the entities involved in this matter and the general nature of their business relationship is adequate for the purposes of this opposition brief.

However, Petitioners' (hereafter "Mayer") assertion that the majority opinion and the dissent of Mr. Justice Clark "are in substantial agreement with respect to the facts shown of record" (p. 7) is without any foundation in the record. On the contrary, with respect to the facts about competition crucial to the matter at hand, Mr. Justice Clark has misapprehended the record and taken positions contrary to that of the Trial Judge, the majority of the Seventh Circuit panel and, indeed, of Mayer itself during all of the proceedings below.

Apparently relying on misapprehensions of fact expressed in the dissenting opinion, Mayer's Statement Of The Case obscures the uncontradicted evidence as to the vital facts as to where Mayer did business, where its competitors did business and where Mayer attempted to do business.

One key misapprehension of fact in the dissenting opinion, relied on by Mayer, is that an Indiana contractor, A. Metz, Inc., "competed with Mayer" (p. 18a); that Mayer "did compete somewhat unsuccessfully with A. Metz, Inc." (p. 19a). In its Petition (p. 8) Mayer, for the first time in this proceeding, seems to claim that Indiana company as a competitor. It did not do so at any time in either court below and in appearing to do so now seems to be relying on the dissent's misapprehension of fact rather than on the evidence at trial where Mr. Metz testified that he did not do any business in Illinois during the period deemed

relevant by Mayer and that Mayer was not a competitor. The relevant testimony of Mr. Metz went as follows:

> "Q. During the period 1958 to '68 did you do any paving work in the State of Illinois?
> "A. No.
> "Q. Do you consider Mayer Paving, or did you during the period 1958 to '68, consider Mayer Paving to be a competitor of yours in the asphalt paving business?
> "A. Well, he was doing work in the area, not that we noticed too much. Apparently he didn't take too much work there.
> "Q. Was that tennis work there sir?
> "A. Well, the point I am bringing out, he did so little work that we didn't even recognize him as a competitor." (Tr. pp. 1225, 1226)

There is no evidence in the record to the contrary.

After the trial, in granting the motion of Respondents for Judgment N.O.V., the Trial Judge held "Mayer's business was conducted almost exclusively in Northern Cook County, Illinois. [Mayer's] evidence shows that its competitors were engaged exclusively in intrastate commerce insofar as the asphalt business is concerned" (p. 24a). Mayer never quarreled with these findings in the Court of Appeals. In its brief to the Court of Appeals for the Seventh Circuit, Mayer, in connection with its argument that "competitive injury, even when purely local is actionable" under Section 2(a) of the Act (Opening Brief p. 33), candidly admitted that it "remained essentially a local businessman and not a real competitor for paving business in Indiana" (Opening Brief p. 30); the same admission that Mayer is essentially a local businessman is repeated in the Petition at page 14. The majority opinion of the Court of Appeals accurately stated, therefore, that "on this appeal Mayer Paving has not contended that any

of the sales to its competitors or itself were 'in commerce'" (p. 11a), and that "Mayer Paving has not argued in this court that its activities in Indiana, which might be characterized as *de minimis*, brings it into competition with Indiana contractors" (n., p. 5a).

A second fundamental misapprehension of the trial issues and record and the issues on appeal is revealed by the following statements in the dissenting opinion: "Mayer was prevented from effectively competing across the border in Indiana * * * it tried to compete in Indiana with A. Metz but failed * * * General Dynamics' action prevented Mayer and other Illinois asphalt manufacturers and paving contractors from competing in Indiana * * *" (p. 19a). In apparent reliance on these statements Mayer now belatedly asserts (p. 9) that it was not an "effective" competitor in the "northwest Indiana area", *i.e.* it was some kind of a competitor in northwest Indiana. The fact of the matter, as pointed out in the majority opinion, is that "Mayer did not claim any status of competition or even potential competition" with respect to Indiana contractors (n., p. 5a).

Mayer also inexplicably adopts the view in the dissenting opinion that General Dynamics did not seek to contradict the evidence Mayer relied on at trial to show price discrimination (pp. 8, 18a). On the contrary, consistent with its objections at trial and its alternative motion for a new trial in the trial court, one whole section of Material Service's Brief in the Court of Appeals consisted of argument captioned as follows:

> "THE RECORD IS BARREN OF EVIDENCE THAT MATERIAL SERVICE WAS GUILTY OF DISCRIMINATION IN PRICE AS TO MAYER. WHAT THE RECORD SHOWS IS THAT MAYER WAS A FAVORED PURCHASER RATHER THAN A DISFAVORED PURCHASER."

That General Dynamics did contradict the evidence relied on by Mayer in the trial court to show price discrimination was acknowledged by the majority below when it said: "Because of the result we have reached on this [the 'in commerce'] issue we find it unnecessary to * * * consider General Dynamics' cross-appeals as to the insufficiency of Mayer Paving's proof at trial" (n., p. 11a).

Mayer also distorts the posture of this case when it asserts that the majority of the court below "did not dispute the fact that the Mayers had suffered severe discrimination in their purchases in comparison with their Illinois competitors" (p. 9). As we have just pointed out, the majority did not reach the issue of the sufficiency of Mayer's evidence on the issue of price discrimination.

ARGUMENT

I.

The Court of Appeals for the Seventh Circuit Correctly Interpreted the Commerce Provisions of Section 2(a) of the Clayton Act, as Amended, Consistent with Prior Decisions of this Court.

The argument advanced by Mayer, if adopted by this Court, would completely divorce the concept of competition from the Robinson-Patman Act. On the strength of a 23-word excerpt of a lengthy and difficult legislative history,* Mayer seeks to extend the jurisdiction of the Robinson-Patman Act to accomplish irrational results. Under Mayer's argument, if a New York manufacturer sold to an Illinois retailer at a higher price than he sold to a California retailer, the Illinois retailer would, for purposes of the Robinson-Patman Act, be deemed to have been prejudiced and adversely affected in his "competition" although, *in actual fact,* no competition existed between the California and Illinois retailer. Under Mayer's theory the crucial facts of competition become "factoids".

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* Mayer's interpretation of the legislative history of the Robinson-Patman Act is both imaginative and unique. Mayer's Petition attempts to imply that the words "any person, whether in commerce or not" were carefully and surgically deleted from the House version of the bill. A reading of the Conference Committee Report plainly discloses what the joint Conference deleted and the reasons therefor. Frederick Rowe, based upon his reading of the deleted clause, in its entirety, asserts that the Conference "struck a clause in the House bill which would have adopted the 'effect on commerce' criterion." F. Rowe, *Price Discrimination,* § 4.9 at p. 78 (1962).

This is completely contrary to every reasoned analysis of the Robinson-Patman Act. The nexus between the Robinson-Patman Act and any alleged discrimination is *competition* in commerce. The legislative history,* the courts, and the commentators all agree on this point. As the Court of Appeals properly observed, a price discrimination is actionable only to the extent that it affects competition in interstate commerce. This basic principle has been consistently enunciated by the courts following this Court's decision in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). *See Lerhman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972); *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973); *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972); *Food Basket Inc.* v. *Albertson's Inc.*, 383 F.2d 785 (10th Cir. 1967); *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). The Court of Appeals properly applied that established principle to this case.**

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* Representative Utterback described this concept as follows:

"Underlying the meaning of the word [price discrimination] is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. * * * But where no such relationship exists . . . the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill." 80 Cong. Rec. 9416 (1936).

** The only arguable exception to this statement is the recent decision of *Copp Paving Co.* v. *Gulf Oil Co.*, No. 72-2152 (9th Cir. Oct. 3, 1973). In the *Copp* case, the ninth Circuit held that "the production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and

(footnote continued on next page)

When the courts have interpreted and applied a given act of Congress repeatedly and Congress has not acted to in any way rebuke or invalidate that interpretation, this Court has declared that such interpretation has been accorded legislative approval. *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Ry.*, 385 U.S. 182, 184 (1966); *Blau* v. *Lehman*, 368 U.S. 403, 412-13 (1962); *United States* v. *Elgin, Joliet & E. Ry.*, 298 U.S. 492, 500 (1936). That is the situation which now confronts this Court. If Congress intended to amplify or in any way broaden the scope of the Robinson-Patman Act it could have, and presumably would have, done so. Its refusal to act indicates a Congressional approval of the judicial interpretation accorded the Act.

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placed them 'in' that commerce as a matter of law." The court further held that, for purposes of the Robinson-Patman Act, in such a situation, there is no requirement that one of the challenged sales be of an interstate character. To the extent that Mayer will argue in reply that the *Copp* case presents a conflict, some brief discussion is required. First it should be observed, that the issues presented and argued in *Copp* are substantially different from the situation involved in Mayer. As Mayer expressly admits in its opening statement, it did not engage in, or compete for, contracts involving interstate highways. (Tr. p. 10) Second, and, for purposes of a Writ of Certiorari, more important, the *Copp* decision grew out of an interlocutory appeal. The *Copp* case involves alleged violations of both the Sherman Act and the Clayton Act in addition to the Robinson-Patman Act. Following a full trial on the merits, the issue preliminarily decided on appeal may be eliminated. In any event, the law is clear that Certiorari, in the usual course, is not granted to review a non-final judgment such as the one involved in *Copp*. Stern and Gressman, *Supreme Court Practice*, §4.19 (4th Ed. 1969). Similarly, certiorari issues primarily not to correct errors in the decision below, but rather to resolve conflicts between the circuit courts and to determine questions of importance. *Id.* at Sec. 4.18.

II.

There Is No Conflict Between This Court's 1954 Decision in Moore v. Mead's Fine Bread Co. and That of The Court Below.

Analysis of this Court's decision in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954) demonstrates there is no conflict between it and the decision of the Court of Appeals for the Seventh Circuit.

In *Moore*, the plaintiff and defendant were competitors in the bakery business. Plaintiff's bakery business was confined to Santa Rosa, New Mexico. Defendant was one of a group of interlocked corporations with bakeries in both Texas and New Mexico which produced and marketed "Mead's Fine Bread". It served one Texas town, Farwell, from one of its New Mexico plants. A price war developed in Santa Rosa, New Mexico and defendant cut its bread prices there by about one-half. Defendant's prices elsewhere, including Farwell, Texas, were not altered. The defendant's price cut in Santa Rosa, New Mexico drove the plaintiff out of business. Plaintiff sued for violation of the Robinson-Patman Act and obtained a judgment which was reversed by the Tenth Circuit because the "injury resulting from the price cutting was to a purely local competitor whose business was in no way related to interstate commerce" (*Id.* at 117). This Court reversed, stating that the requirements of both Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act* were met:

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* Section 3, in relevant part, provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States

(footnote continued on next page)

> "Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the interstate transactions and cutting the price in the intrastate sales. *The destruction of a competitor was plainly established, as required by the amended* §2(a) *of the Clayton Act; and the evidence to support a finding of purpose to eliminate a competitor, as required by §3 of the Robinson-Patman Act, was ample.*" (*Id.* at 118) (Emphasis added)

This Court also observed:

> "We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants." (*Id.* at 119)

Neither the facts, the holding, nor the dicta of the *Moore* case bears upon this case. The only similar facts are that

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for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." (15 U.S.C. §13a)

in each case the plaintiff is a "local merchant" and the defendant is engaged in interstate commerce. The key to understanding *Moore,* which eludes Mayer, is that plaintiff Moore and defendant Mead were competitors and the injury to competition was to the competition between the seller (Mead) and the *seller's* competitor (Moore). This is often termed "primary-line injury"; in such a case, if the defendant is "in commerce" and in that commerce competes with plaintiff, the requirements of §2(a) are met. In the case at hand, as the majority below properly recognized (pp. 5a, 10a, 11a), the only relevant injury is injury to competition between the seller's customer (Mayer) and the *customer's* (Mayer's) competitors. This is called "secondary line injury"; in such a case whether the defendant is "in commerce" is irrelevant unless either or any of the sales complained about to the plaintiff and its competitors is "in commerce". It is undisputed in the case at bar that none of the complained about sales to Mayer or its competitors were "in commerce".

The "in commerce" requirement must, of course, be met both in primary and secondary line competitive situations. How it is met varies with the actual competitive situation. As the majority opinion noted (p. 8a), courts and commentators often distinguish primary line competition from secondary line competition as an aid to rational analysis. It is an aid to analysis of § 2(a) cases under the Robinson-Patman Act which Mayer persistently refuses to use.

It is clear from the foregoing that the Court of Appeals opinion is not in conflict with any facet of this Court's opinion in *Moore* v. *Mead's Fine Bread,* 348 U.S. 115 (1954).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Mayer's Petition for Certiorari should be denied.

Respectfully submitted,

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